

STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the investigation, on the)	
Commission's own motion, into the electric)	
supply reliability plans of Michigan's)	Case No. U-18197
electric utilities for the years 2017 through 2021.)	
_____)	

At the May 11, 2017 meeting of the Michigan Public Service Commission in Lansing,
Michigan.

PRESENT: Hon. Sally A. Talberg, Chairman
Hon. Norman J. Saari, Commissioner
Hon. Rachael A. Eubanks, Commissioner

ORDER

Since 1998, the Commission has conducted annual investigations into the adequacy and reliability of electric generation capacity for meeting Michigan customers' requirements. In an order issued on January 12, 2017, the Commission called upon electric utilities regulated by the Commission, alternative electric suppliers, utility affiliates, and certain power supply cooperatives and associations to submit a self-assessment of their ability to meet their customers' expected electric requirements (and associated reserves) during the five-year period of 2017 through 2021 (January 12 order). The self-assessments were due by April 21, 2017, and comments on the self-assessments are due by May 12, 2017.

In the January 12 order, the Commission invited parties who intended to submit confidential commercial or financial information to make use of the Protective Order attached to the order as Exhibit A, and indicated that comments addressing such information shall also be filed

confidentially. Finally, the January 12 order directed the Commission Staff (Staff) to submit a report reviewing the capacity outlook no later than June 30, 2017.

Self-assessments were filed by, among others, Direct Energy Services, LLC, (Direct Energy), Constellation Energy Services, Inc., and Constellation NewEnergy, Inc. (collectively Constellation), Direct Energy Business, LLC (DEB), Calpine Energy Solutions (Calpine), and First Energy Solutions (First Energy). All of these entities filed at least portions of their self-assessments confidentially.

On April 28, 2017, Consumers Energy Company (Consumers) filed a motion to compel production of documents pursuant to the Protective Order.¹ The motion was accompanied by Nondisclosure Certificates executed by seven Consumers employees for each of the alternative electric suppliers listed above (the Constellation entities being treated collectively).

On May 2, 2017, the Commission's Executive Secretary emailed a letter to these alternative electric suppliers informing them of the filing of the motion, and directing them, by 5:00 p.m. on May 8, 2017, to file either an affidavit indicating that disclosure via electronic service of the requested documents to Consumers had taken place, or, if they wish, a response in opposition to Consumers' motion. The letter indicated that the Commission would rule on the issues raised by the pleadings at the May 11, 2017 meeting, if a response in opposition was filed.

On May 8, 2017, Constellation filed a response in opposition to the motion, and Direct Energy, DEB, and Calpine filed a joint response in opposition to the motion to compel. On May 9, 2017, First Energy filed a response in opposition.² No affidavits were filed.³

¹ Consumers correctly notes that references in the Protective Order to the "December 20, 2016 order" should be read as referring to the "January 12, 2017 order." Consumers' motion, p. 4, n. 2.

² The five responding alternative electric suppliers are referred to hereinafter as the AESs.

In its motion, Consumers notes that Section 6w(8) of 2016 PA 341 (Act 341), MCL 460.6w(8), is a newly-enacted law requiring annual resource adequacy demonstrations from utilities and alternative electric suppliers. Consumers states:

If an AES does not meet the resource adequacy demonstration requirement for its Retail Open Access (“ROA”) load in Michigan, the applicable electric utility becomes obligated to provide capacity service to that ROA load, and a State Reliability Mechanism (“SRM”) capacity charge is assessed to the ROA customer. MCL 460.6w(3), (6), (7) and (8). Thus, the annual AES resource adequacy demonstration requirements of Act 341 will significantly impact the retail load for which the incumbent utility must plan to serve with generation capacity resources. Consumers Energy is therefore directly impacted by the ability of AESs to demonstrate resource adequacy for retail customers in Michigan.

Consumers’ motion, pp. 2-3. Consumers argues that in order to provide comments on the capacity self-assessments of alternative electric suppliers, the utility requests production of the filings made confidentially. Consumers indicates that it will abide by the terms of the Protective Order.⁴

In response, the AESs note that they have voluntarily filed self-assessment reports since the inception of these reliability plan proceedings. They point out that this is not a contested case, thus giving them no avenue to dispute another party’s filing or comments, to cross-examine witnesses or test evidence, to seek discovery, or to make legal arguments. The AESs state:

Recognizing that some material provided by the parties may contain commercially sensitive information, the Commission has provided a Protective Order so that submissions to the Commission will be protected. See Order, p. 5. Ordering paragraph F of the Order states that, “The submission of commercially sensitive information by any person will be treated as being voluntarily provided to the Commission under MCL 15.243(1)(f)” (emphasis added). MCL 15.243(1)(f), referenced in the Order, provides protection for, “[t]rade secrets or commercial or financial information voluntarily provided to an agency for use in developing

³ On May 10, 2017, Consumers filed a reply to the responses. The Commission’s Rules of Practice and Procedure do not provide for replies to responses, and the reply has not been considered.

⁴ Consumers also attempts to argue about what filings and evidentiary determinations should be required in order to make a capacity demonstration under Section 6w. This is not an issue in this dispute over the filings required by the January 12, 2017 order.

governmental policy” (emphasis added). Thus, both ordering paragraph F and MCL 15.243(1)(f) explicitly state that the sensitive information is being provided to the agency for its own purposes (“for use in developing governmental policy”). Neither explicitly discusses the sharing of that information with other parties, such as would be presumed to occur in a contested case subject to discovery rules.

Direct Energy, DEB, and Calpine’s response, p. 2 (emphasis in original). The AESs contend that the voluntary provision of information to the Staff does not confer a right to discovery on other parties to the same Commission investigation.

The AESs further point out that Consumers makes plain that it seeks this information for use in another proceeding, namely the Section 6w proceeding opened by the Commission for Consumers in Case No. U-18239, which is a contested docket in which all of the parties to the instant dispute are intervenors. Noting that the instant docket is an uncontested docket, the AESs maintain that the Commission should not allow Consumers to obtain material in this docket for use in another one. The AESs contend that the SRM capacity charge is not the subject of this proceeding, and that the procedural protections offered by the Michigan Administrative Procedures Act (APA), MCL 24.201 *et seq.*, do not apply to this uncontested proceeding. The AESs point to Consumers’ motion wherein the company indicates its intent to use the confidential information in violation of the terms of the Protective Order, which itself states that Protected Material may be used “only for the purposes of analyzing the issues, and preparing comments, or other motions or filings in Case No. U-18197.” Protective Order (Exhibit A to the January 12 order), p. 4. The AESs contend that Consumers seeks the information for purposes of advocacy on SRM-related issues.

Additionally, Constellation argues that Consumers’ motion violates MCR 2.302(A)(2) which provides that a motion to compel may not be filed unless “the discovery sought has previously been requested and refused.” Constellation notes that Consumers did not serve any discovery

requests, and there has been no refusal. Constellation further posits violation of MCR 2.310(C)(3) which requires proof of service of the discovery request and imposes an obligation for the parties to confer or attempt to confer. Constellation maintains that the Commission's authority to compel discovery arises under the APA, which provides for discovery in contested cases, and under Mich Admin Code, R 792.10423, which provides for discovery in "hearings." MCL 24.271-24.287. Constellation notes that only relevant, non-privileged information which is reasonably calculated to lead to the discovery of admissible evidence is discoverable under Michigan law, and that the rules of evidence are to be followed as far as practicable in Commission proceedings. MCR 2.302(B)(1); Mich Admin Code, R 792.10427(1). Since the instant case does not involve an evidentiary hearing, Constellation argues, production of the confidential information cannot lead to the discovery of admissible evidence.

As a result of the passage of Act 341, this is the last annual capacity investigation docket in which the Commission requested alternative electric suppliers to voluntarily provide information regarding their present and future capacity plans. On April 20, 2017, Section 6w of Act 341 became effective, and in another multi-captioned order issued today, the Commission commences a series of technical conferences for the purpose of determining how Section 6w will be implemented and what evidence will be required in order to make the demonstration mandated by MCL 460.6w(8) for utilities, alternative electric suppliers, electric cooperatives, and municipally-owned electric utilities. The Commission has not yet determined what resources shall be counted in the capacity demonstration determinations required under that section, and this motion to compel cannot be used to further that discussion.

The Commission agrees with the AESs and finds that Consumers' motion should be denied. The AESs' participation in these annual reliability plan investigations has always been voluntary.

While Act 341 has changed that situation, the capacity demonstrations required from the AESs (and the utilities) and the determination and implementation of the SRM capacity charges will not occur until 2018. The order issued today in Case No. U-18197 *et al.* seeks comments on threshold issues, and sets a schedule for additional comments and a series of technical conferences for establishing the capacity demonstration process.

In its motion, Consumers states that it seeks the AESs' confidential information as a result of the passage of Section 6w of Act 341. Consumers even attempts to use the motion to decide the issue of what constitutes a sufficient demonstration. The Commission finds that this is premature and inappropriate. This docket is not the place where a decision on the sufficiency of the AESs' capacity holdings will be made. For Consumers to use the confidential information to try to demonstrate an insufficiency, or indeed to argue over any issue related to its SRM capacity charge, would be a violation of the Protective Order. Given that Consumers has evinced such an intention in its motion, the motion must be denied. This docket is an uncontested investigation. Decisions regarding the sufficiency of a capacity demonstration and the amount of an SRM capacity charge applicable to any entity will be made in contested dockets after the conclusion of the technical conferences. Undoubtedly, the confidential information sought by Consumers from the AESs, or similar confidential information, will be disclosed and that evidence will be tested in those proceedings. This docket is not the forum for those issues, and discovery "is neither a weapon nor a means of obtaining information to be used in another forum." April 17, 1991 order in Case No. U-9732, p. 6.

THEREFORE, IT IS ORDERED that the motion to compel filed by Consumers Energy Company is denied.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26. To comply with the Michigan Rules of Court's requirement to notify the Commission of an appeal, appellants shall send required notices to both the Commission's Executive Secretary and to the Commission's Legal Counsel.

Electronic notifications should be sent to the Executive Secretary at mpscedockets@michigan.gov and to the Michigan Department of the Attorney General - Public Service Division at pungpl@michigan.gov. In lieu of electronic submissions, paper copies of such notifications may be sent to the Executive Secretary and the Attorney General - Public Service Division at 7109 W. Saginaw Hwy., Lansing, MI 48917.

MICHIGAN PUBLIC SERVICE COMMISSION

Sally A. Talberg, Chairman

Norman J. Saari, Commissioner

Rachael A. Eubanks, Commissioner

By its action of May 11, 2017.

Kavita Kale, Executive Secretary